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IN THE

Supreme Court of The United States

October Term, 1972

No. 72-1583

JIM HATTON
INDIVIDUALLY AND DBA
AIR CONTROL ENGINEERING COMPANY
Petitioner

v.

PETER J. BRANNAN
SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR
Respondent

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

L. H. Warburton, Jr.
Perkins, Davis, Oden & Warburton
P. O. Drawer 331
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Counsel for Petitioner

May 22, 1973

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Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

The petitioner, JIM HATTON, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit issued on February 27, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported and appears in 474 F 2nd 9. The opinion of the District Court for the Southern District of Texas is reported at 348 F Supp. 895.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 27, 1973. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court in invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Suit herein was brought by the Secretary of Labor seeking to enjoin the petitioner herein under the provisions of the Fair Labor Standards Act. Title 29 U.S.C. Sec. 201 et seq. The District Court held that the defendant was not within covered by the act and denied the requested relief. The Honorable United States Appeals Court (Fifth Circuit) reversed and the questions hereby arising are, to-wit:

1. Should the term "enterprise" as is contained in 29 U.S.C. Sec. 203 (R) be synonymous with business?

2. Is "enterprise concept" as construed by the Honorable Fifth Circuit in conflict with the announcement of this Supreme Court in Maryland v. Wirtz (1968) 88 S. Ct. 2017?

3. Has the concept of "enterprise" been properly broadened so that any employer with employees who work on goods that have moved in or have been produced by commerce are thereby covered under 203 (S)?

STATEMENT OF FACTS

Jim Hatton is a dealer in air conditioning equipment (SF 15). The equipment being manufactures in Texas (SF 17). Occasionally he did purchase parts which were shipped from Texas distributors to him (SF 183). Ninety per cent (90%) of his purchases were manufactured in Texas (SF 183). He regarded himself as being in an intra state business (SF 185). He was engaged in the business

of installation of air cooling and heating system (opin. 1). Ninety per cent (90%) of his work was residential (SF 185). As to the parts that were manufactured outside of Texas some of them were handled by employees and some were sold direct to customers (SF 180).

STATUTORY PROVISIONS INVOLVED

203 (r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including department of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: Provided, That, within the meaning of this subsection, a retain or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons —

(1) in connection with the operation of a hos-

pital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit of not for profit),

shall be deemed to be activities performed for a business purpose

203 (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which —

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service

establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

REASONS FOR GRANTING THE WRIT

The only opinion that we find of this Supreme Court construing "enterprise concept" was enunciated in

Maryland v. Writz 88 S. Ct. 2017 (1968) in which the Court's stated "thus the effect of the 1961 change was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but *not* to enlarge the class of *employers* subject to the Act."

"Enterprise" under the Fifth Circuit opinion hereunder does extend and enlarge the class of employers, brings in under coverage the lone small business man working primarily on residential properties such as this petitioner, JIM HATTON — together with carpenters, plumbers, electricians, painters and many others dealing with construction.

The very definition of "enterprise" as set forth in Section 203 (r) requires that the defendant be in more than one business, as the statute provides . . . . the related activities performed (through unified operations or common control by any person or persons for common business purpose . . . .

As can be seen the language of subsection (r) is plural in nature as exemplified by the words "related activities" and "common business and purpose" and, therefore, a single small business should not be an enterprise.

The purpose of the act as stated by this Supreme Court was but to eliminate the fragmented treatment which was given to employees of a business that had some working in "commerce" and others who performed solely intra state functions.

A careful reading of this particular section (r) shows that it is intended to cover the bank-office building type of situation and not the small business man like the petitioner. Other cases in support of this would include *Wirtz v. Columbian Mutual Life Insurance Co.* (WD Tenn. 1965, 246 F Supp. 198) Affd. 6th Circuit 1967

380 F 2d 903). *Montalvo* v. *Tower Life Building* (5th Circuit 1970), 426 F 2nd 1135.

In the case at Bar the Fifth Circuit would seem to avoid this question and directs its reasoning for coverage toward 203 (S).

It would seem to us self evident that there is not coverage under 203 (r).

The cases cited by the court which include *Schultz* v. *Hartin & Son, Inc.* Fourth Circuit 1970 428 F 2d 186; *Wirtz* v. *Melos Construction Corp.* 2 Cir. 1969, 409 F. 2d 626, have been in both instances assumed rather than exploring the question as to the meaning and extent of "enterprise."

"Enterprise" should not be construed as being synonymous with "business:"

The Appeal Court in the case at Bar as well as in other cases in considering 203 (S) construe enterprise as a business rather than a plural operation as the wording of the statute indicates.

The Fifth Circuit in its opinion herein again construes the act contrary to *Wirtz v. Maryland* by creating a third class of covered employees and being those "employees handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person, or . . . ." This we submit is an unconstitutional stretch of the commerce powers and contrary to the wording of the statute.

Including is a limiting phrase rather than an enlarging phrase as the Secretary of Labor apparently contends. The Secretary of Labor is attempting to create this third category by substituting the word "or" for "including" which is certainly not the language of the statute nor

was this the construction given to the statute by the Supreme Court in *Wirtz v. Maryland.*

In *Wirtz v. Maryland* it is noted that this Court enumerated only two classes being: (1) engaged in commerce or (2) in the production of goods for commerce. No mention is made of the third classification which is opened by the Fifth Circuit by virtue of its opinion.

Please note that "includes" as used in the Fair Standards Provision that "employee" includes any individual employed by the employer as a term of limitation to indicate what belongs to a genisus rather than a term of enlargement. *Blankenship v. W. U. Tell Company,* CCA West Virginia, 161 F 2d, 168. Where a general term is followed by the word "including" the primary import of the words following is to indicate restriction. *Application of Spartan Air Lines,* Oklahoma, 185 P 2d, 925.

There is no question but that the appellee hereunder was not engaged in commerce nor was he in the production of goods for commerce. *Mitchell v. H. B. Zachry Company,* 80 Sup. Ct. Rep., 739 (1960), 362 US 310.

The entire import of the Department of Labor position is that if any article that is used in any business comes from outside the State of Texas then the "local business" should be placed in and under inter state commerce under the provisions of 203 (s). This enlargement certainly was not within the scope of this Honorable Supreme Court in *Maryland v. Wirtz.*

The result of such a construction would be to place virtually every small business in the United States under the supervision and control of the Department of Labor. In the case at bar the alleged offenses brought forth by the Department of Labor were of a technical and mathematical nature as opposed to an attempt to pay less

than the minimum wage and in fact the Hatton employees were in virtually every instance receiving more than the minimum wage. Small business just cannot fairly cope with the technical rulings and regulations of the Labor Act Provisions.

To allow this extension of act will amplify coverage and dilute the efforts to enforce what is already a "difficult to supervise" federal regulation.

The Courts have consistently reminded us that Congress has not exercised all of its powers and that local establishments are not to be placed under the act. The Supreme Court in *Wallen v. Jackson Paper Company*, 63 S Ct. 332 317 US 564 stated, "We cannot be unmindful that Congress in acting the statute plainly indicated its purpose to leave local business to the protection of the State."

JIM HATTON is a small local concern dealing primarily with residential units and purchasing all of his materials from intra state sources and with ninety per cent (90%) being manufactured in the State of Texas and a small estimated ten per cent (10%) of his parts coming from out of state sources but through intra state suppliers. This is the type of business that should be left to local control and the provisions of the Fair Labor Standards Act under 203 (r) and (s) should not be extended.

CONCLUSION

For the reasons above enumerated a Writ of Certiorari should be issued for a further judgment and opinion of the United States Court of Civil Appeals (Fifth Circuit).

Respectfully submitted,
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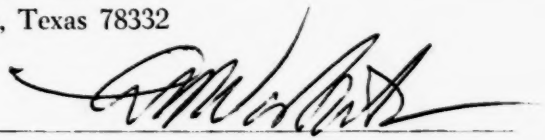

By_____

L. H. Warburton, Jr.

COUNSEL FOR PETITIONER

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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May 22, 1973

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2703

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,
Plaintiff-Appellant,

versus

JIM HATTON, Individually and Doing Business as Air Control Engineering Company,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(February 27, 1973)

Before ALDRICH*, SIMPSON and CLARK, Circuit Judges.

PER CURIAM: The Secretary of Labor sought to enjoin defendant-appellee, individually and as a commercial employer, from violating the minimum wage

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*Hon. Bailey Aldrich, Senior Circuit Judge of the First Circuit, sitting by designation.

and overtime provisions of the Fair Labor Standards Act, Title 29 U.S.C. Section 201 et seq. The district court held the defendant was not within coverage of the Act and denied the requested relief. We reverse.

Defendant-appellee Hatton is a sole proprietorship located in Alice, Texas. The business has three employees. It installs, repairs and maintains air conditioning and heating systems, including duct work, in residential properties. Approximately ninety per cent (90%) of Hatton's purchases were manufactured in Texas. The Secretary claims Hatton is an "enterprise engaged in commerce" as required by Sec. 3(s) of the Act, Title 29 U.S.C. Section 203(s), and therefore subject to the minimum wage and overtime standards of Sections 6 and 7 of the Act, Title 29 U.S.C. Sections 206 and 207.

The theory of "enterprise coverage" by which the Secretary hopes to apply the Act to defendant-appellee was introduced into the law by amendment in 1961. We stated the purpose of "enterprise coverage" in *Montalvo v. Tower Life Building*, 5 Cir. 1970, 426 F.2d 1135, 1139. Limiting coverage of the Act to enterprises which are in more than one business would frustrate that purpose of eliminating fragmentation of the Act's application. Accordingly, defendant-appellee is not exempt from the Act's requirements solely because it is engaged in only one business. See *Schultz v. W. R. Hartin & Son, Inc.*, 4 Cir. 1970, 428 F.2d 186; *Wirtz v. Melos Construction Corp.*, 2 Cir. 1969, 408 F.2d 626; the textual references to a single establishment in Sections 3 (r) and (s) of the Act, Title 29 U.S.C. Section 203 (r) and (s); H. Rept. No.

75, Fair Labor Standards Amendments of 1961, 87th Cong., 1st Sess., p. 7; S.Rept. No. 145, Fair Labor Standards Act of 1961, 87th Cong., 1st Sess., p. 41; and S.Rept. No. 1487, Fair Labor Standards Amendments of 1966, 89th Cong., 2d Sess., p. 7.

The 1961 and subsequent amendments further expanded coverage of the Act by introducing a sweeping definition of "enterprise engaged in commerce or in the production of goods for commerce":

> "(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which —
>
> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000

(exclusive of excise taxes at the retail level which are separately stated);

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection."

Title 29 U.S.C. Section 203(s).

Defendant-appellee is within that definition because it met the two requirements necessary for inclusion: (1) the court below found as a fact that most of the parts used by the employees in their work "were manufactured outside of and had moved in commerce getting to Texas" and this, we hold, is the same thing as saying the defendant-appellee's employees were "handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person"; and (2) the business of installing, repairing and maintaining air conditioning and heating systems, including duct work, in residential properties is an enterprise "engaged in the business of construction or reconstruction or both". Holding that no other requirement exists, we find defendant-appellee is covered by the Fair Labor Standards Act.

REVERSED and REMANDED

ORDER OF THE UNITED STATES DISTRICT COURT (SOUTHERN DISTRICT OF TEXAS)

MEMORANDUM AND ORDER

The Secretary of Labor has sued Defendant Jim Hatton, individually and doing business as Air Control Engineering Co., asking that said Defendant be enjoined from violating the Fair Labor Standards Act and from

withholding payment of minimum and overtime wages due his employees.

During the period of time here in question, Defendant's principal business was the installation of air-cooling and heating systems, including the duct work, in new residential homes and also in homes previously built and occupied, and the repair and maintenance work on such systems. The installations in commercial buildings, new and old, have been minimal. This business was carried on under the name of Air Control Engineering Co., sometimes referred to as AirCon, in Alice, Texas. It was a small, local business, and Defendant employed three men who did the installation work and general repair and maintenance on such systems. It still is a small, local business.

The Secretary is claiming Fair Labor Standards Act coverage by virtue of the so-called "enterprise" section, 29 U.S.C., §203, contending that Defendant is an enterprise under subsection (r); and that his employees are "handling, selling, or otherwise working on goods that have been moved in or produced for commerce," and are "engaged in the business of construction or reconstruction or both," under subsection (s)(3). Thus, says the Secretary, Defendant is engaged either in commerce or in the production of goods for commerce and must pay minimum wages and for overtime as prescribed in the Act. The Defendant questions the interpretation put on the above-cited provisions by the Secretary.

The definition of "enterprise" set forth in 29 U.S.C., §203(r), requires the Defendant to be in more than one business, as we read that provision, and the enterprise results from, as the statute provides, "... the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose...." This definition was in the 1961 amendment to the Act and was not substantially changed in the 1966 amendment. The Secretary of Labor seems to take the position that AirCon, standing alone, is an enterprise because it is in the construction business, and that the other business activities of Defendant need not be considered.

But this Court cannot believe the Congress intended that a lone, small contractor, working primarily on residential property, should be so classified. Consequently, at the risk of having overlooked the obvious, and realizing it is well established that the provisions of the Fair Labor Standards Act are to be liberally construed, this Court will proceed with its explanation of why Defendant should not be considered an enterprise. The language in subsection (r) is plural by nature. Why use the words "related activities" and "common business purpose" if a single, small construction business is an enterprise? To say the greater includes the lesser, under the language of the pertinent provisions, is not a reasonable answer. The fact that the Act refers to "whether performed in one or more establishments" does not charge things. The words "one or more establishments" not having been defined in the Act by Congress, the common usage of those

words should be accepted. *Walling v. Fred Wolferman, Inc.*, 144 F.2d 354. *Webster* says "establishment" is "a place of business. . .with its furnishings and staff." It is a physical place and has nothing to do with the nature of the business involved.

The testimony before this Court must be balanced against such definition, and, if this is done, it seems to this Court that it will take some exaggeration to justify the classification of Hatton as an enterprise. That testimony shows, in addition to AirCon, the Defendant Hatton operated the municipal airport for the city of Alice, Texas, under the corporate name of South Texas Airmotive, sometimes referred to as Airmotive. The employee with Airmotive was Juan Ramirez, whose main job was to keep the lobby of the airport building clean, operate the filling station used in refueling the aircraft, and general activities in connection with the airport. Ramirez sometimes went on service calls for AirCon as a helper when additional help was needed, but usually he went along primarily for the purpose of learning the business.

This testimony reflects that Defendant also has some kind of contract (the exact nature of which was never explained) with a certain number of oil and gas drilling contractors who maintain offices in Alice, Texas. There is no evidence that it was anything more than a personal-service arrangement between Defendant and the drilling contractors. The office manager for Mr. Hatton, Earl Cravens, handled that job, but there is very little proof as to his duties, and nothing to indicate he did anything other than work for AirCon.

The Secretary places great store by the opinion of the Second Circuit in *Wirtz v. Melos Construction Corp., et al,* 408 F.2d 626 (1969), but the court there assumed the existence of an enterprise and does not discuss at all what is necessary to create one. We do not regard it as in any way controlling in the instant case.

By way of further explanation of what this Court considers the term "enterprise" to mean, we wish to point out there are three elements to be considered in making such determination. Those elements are (1) related activities, (2) unified operation or common control, and (3) common business purpose. In the case of *Wirtz v. Savannah Bank & Trust Co. of Savannah, Ga.*, 362 F.2d 857, 859 (5 Cir., 1966), the Court tied an office building and a bank together as an enterprise by explaining the advantages to a bank by having its own office building, a portion of which it occupies, and the balance is rented to various tenants. The Court said, "Thus there is a very real relationship between the operation of the office building and the bank sufficient to satisfy the statutory requirement." Once the existence of the enterprise was established, since the bank was already in commerce, the office building became subject to the Act. Obviously, this is the sort of situation the enterprise concept is expected to reach.

While it is clear that the several operations of Defendant Hatton were either under his common control or were operated such as to be considered a unified operation, it also seems clear that the three different

businesses operated by Defendant, as above outlined, are not related activities in the sense that *Savannah Bank & Trust* is talking about.

The operation of an air-conditioning and heating business, dealing primarily with residential properties, the management of a small, municipal airport, and a personal-service contract with oil and gas drilling contractors, are activities about as unrelated as you would normally find any place, under the direction of one small-businessman.

Further, there is no common business purpose as between the above-mentioned, unrelated businesses. It is obvious that Defendant Hatton is in business to make a profit, or at least he hopes to make a profit. However, the profit motive alone is not enough to make Defendant Hatton's business operations an enterprise for the purposes of the Act. The *Savannah Bank & Trust* case, supra, makes it clear there must be other factors to be taken into account other than the common profit motive. *Shultz v. Morris*, 315 F.Supp. 558 (1970), supports the above conclusions of this Court.

We recognize that Defendant Hatton controls the operations and there may be, from time to time, some interchange of employees as between the airport management and the air-conditioning and heating business, and thus the "unified operation or joint control" portion of the "enterprise" definition is satisfied. However, this does not change the result reached by the Court.

The Court concludes that Defendant Hatton is not an "enterprise" as defined in the Fair Labor Standards Act and therefore is not subject to the provisions of such Act.

There is one further reason why it seems to the Court that the operations of Defendant Hatton are not covered by the Act. Even if Hatton's AirCon, standing alone, did fit the definition of an "enterprise," this Court is of the opinion such operations do not constitute an enterprise engaged in commerce or in the production of goods for commerce.

The Court recognizes that Defendant Hatton purchased practically all the heating, air-conditioning and refrigeration equipment, parts and supplies used in the AirCon business from wholesale dealers in Texas, although most of such parts were manufactured outside of and had moved in commerce getting to Texas. The manufacturing companies shipped the equipment, parts and supplies to warehouses in Texas, from which various items were, from time to time, delivered to wholesalers on order. These latter shipments were within the State of Texas. Defendant Hatton purchased his needs from such wholesalers. The evidence is also clear that AirCon was a small and strictly local concern. The Defendant doesn't contend he is the ultimate consumer of the items he purchases.

Since the employees of AirCon do work, primarily, on residential homes, new and old, in Alice, Texas, their activities, admittedly that of handling, selling and

otherwise working on "goods that have been moved in or produced for commerce" do not put the Defendant in the business of *producing* goods for commerce in the traditional or under the enterprise concept. To say otherwise would be to unrealistically construe the nature of the Defendant's activities and to expand the scope of the words contained in the statutory provisions. The language clearly implies that the goods being produced are not yet in commerce.

Consequently, the Defendant's activities as described must classify it as an enterprise engaged in commerce. Except for the above-quoted language, "handling...goods that have been moved in...commerce," there is nothing in the Fair Labor Standards Act which puts a small, local concern, such as Defendant operates, even if in the construction business, into commerce. The Courts have consistently reminded us that Congress has not exercised all of its powers and that local establishments are not to be placed under the Act. The Supreme Court in *Walling v. Jacksonville Paper Co.*, 63 Sup. Ct. 332, 317 U.S. 564, stated, "We cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the state."

The traditional meaning of "in commerce" and "in the production of goods for commerce" remains the same under Sections 206 and 207 of the Act, except when the employer is duly classified as an "enterprise." When that takes place, the meaning is extended, a classic example being the *Savannah Bank*

& Trust case. However, this Court does not understand how such meaning can logically be extended as far as the Secretary suggests. If it is permitted, the language "including employees handling...goods that have been moved in or produced for commerce" will be made into a third category by substituting the word "or" for "including" and thus bring an entirely new class of employees under the Act. If this construction is to be followed, the enterprise concept will be stretched completely out of shape, and far beyond the area which Congress intended to cover. This would permit the tail to wag the dog.

The foregoing constitutes the findings of fact and the conclusions of law of the Court. This is a final judgment. It is therefore ordered that the relief asked for by Plaintiff Secretary of Labor against this Defendant be and it is hereby denied, and the Court grants judgment for said Defendant, Jim Hatton. The costs are assessed against Plaintiff.

Signed this 6th day of March, 1972.

/s/ Owen D. Cox
UNITED STATES
DISTRICT JUDGE

[Entered March 15, 1972]

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1583

JIM HATTON INDIVIDUALLY AND D/B/A AIR CONTROL ENGINEERING COMPANY, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 474 F.2d 9. The opinion of the district court (Pet. App. 5-13) is reported at 348 F.Supp. 895.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1973. The petition for a writ of certiorari was filed on May 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the definition of covered enterprise in Sections 3(r) and 3(s) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(r) and (s)) excludes from the cov-

erage of the Act employers who are engaged in only one business.

2. Whether an employer who has "employees handling * * * or otherwise working on goods that have been moved in * * * [interstate] commerce" is exempt from enterprise coverage under Section 3(s) by reason of the fact that his employees are not engaged in interstate commerce or in the production of goods for interstate commerce.

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth in the petition at pp. 3-5.

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 217) to enjoin petitioner from violating the Act's minimum wage, overtime, and recordkeeping provisions, and from continuing to withhold unpaid wages due to his employees (A. 3-7).[1] The district court dismissed the complaint without reaching the merits, on the ground that the employees were not covered by the Act (A. 16). The court of appeals reversed, upholding the Secretary's position that petitioner's business is a covered enterprise within the definition of Section 3(s) of the Act (Pet. App. 5).

Petitioner is engaged in Texas in the installation and maintenance of air conditioning and heating systems,

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[1] "A." references are to the appendix filed in the court of appeals. We are lodging a copy of that appendix with the Clerk. "Pet. App." refers to the appendix to the petition for certiorari which petitioner has filed under separate cover.

including duct work, in new and in occupied residential structures (Pet. App. 6).[2] Most of the parts used in these operations are manufactured outside of Texas and have moved in interstate commerce before reaching petitioner (Pet. App. 11).

ARGUMENT

1. The court of appeals correctly held that "[petitioner] is not exempt from the Act's requirements solely because it is engaged in only one business" (Pet. App. 2). As the court noted, the legislative purpose in adding enterprise coverage to the scope of the Act in 1961 was "to eliminate fragmentation" of the Act's application by which some employees in a business or establishment had the protection of the Act and others who worked side by side with them did not. S. Rep. No. 145, 87th Cong., 1st Sess., p. 31. There is no reason why Congress would have wished to eliminate such fragmentation only in the special case of employees who work for employers engaged in two or more industries. If anything, the contrary intention is stated in the Committee Reports of both Houses: "The bill's approach is to treat as separate enterprises those businesses which are unrelated to each other" (H. Rep. No. 75 (Fair Labor Standards Amendments of 1961), 87th Cong., 1st Sess., p. 7; S. Rep. No. 145, *supra*, p. 41).

It is plain also from the text of Sections 3(r) and 3(s) of the Act that the 1961 Amendments contemplated that single businesses would be subject to enterprise

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[2]As the district court noted (Pet. App. 6), the Secretary claims coverage of petitioner's air conditioning business on the ground that such a business is itself a covered enterprise. It is therefore unnecessary to consider petitioner's other activities discussed in the district court's opinion (Pet. App. 8-10).

coverage. For example, Section 3(s), in defining covered enterprises, refers expressly to "an enterprise" which "(1) * * * is a gasoline service establishment" or "(2) is engaged in laundering * * *," or "(3) is engaged in the business of construction" or "(4) is engaged in the operation of a hospital."

Accordingly, the courts have in a large number of cases held businesses to be covered enterprises without reference to any second business operated by the same employer. *E.g., Wirtz* v. *Melos Construction Corp.*, 408 F. 2d 626 (C.A. 2); *Shultz* v. *W. R. Hartin & Son, Inc.*, 428 F. 2d 186 (C.A. 4); *Brennan* v. *Greene's Propane Gas Service*, 21 WH Cases 57, 71 CCH Lab. Cas. par. 32,907 (C.A. 5, No. 71-2339, May 16, 1973); *National Automatic Laundry and Cleaning Council* v. *Shultz*, 433 F. 2d 689 (C.A. D.C.); *Wirtz* v. *Allen Green & Associates*, 379 F. 2d 198 (C.A. 6). Prior to its reversal, the instant district court decision stood alone in holding a second business to be required for enterprise coverage under the Act.

2. In holding that the commerce requirement of Section 3(s) is satisfied by the "handling" of goods originating outside the State (Pet. App. 5), the court below is in accord with the other courts of appeals which have ruled on the issue. See *Wirtz* v. *Melos Construction Corp., supra*, 408 F. 2d at 627-628 (C.A. 2); *Clifton D. Mayhew Inc.* v. *Wirtz*, 413 F. 2d 658, 662 (C.A. 4); see also *Shultz* v. *Kip's Big Boy, Inc.*, 431 F. 2d 530, 532-533 (C.A. 5).

That holding is correct. Section 3(s) defines covered enterprises as "including [those having] employees handling * * * goods that have been moved in * * * commerce," and the courts below here found that "most of the parts used by [petitioner's] employees in their

work 'were manufactured outside of and had moved in commerce getting to Texas' " (Pet. App. 5). The legislative history of the Act confirms the plain meaning of this statutory language. See *Melos, supra,* 408 F. 2d at 628-629; *Mayhew, supra,* 413 F. 2d at 662. It shows a specific intention to extend the Act's coverage to enterprises using goods originating out of the State in recognition of "[t]he obvious economic fact that demand for a product causes its interstate movement quite as surely as does production" (see 107 Cong. Rec. 6236). In the House, this extension was attacked as a "far reaching" provision which would "subject to Federal regulation any entire enterprise which has one or more employees, who handle, sell, or otherwise work on goods 'that have been moved or produced for commerce * * *' " (107 Cong. Rec. 4631), "notwithstanding the fact that the employees may not be engaged in commerce or in the production of goods for commerce in the traditional sense" (H. Rep. No. 75, 87th Cong., 1st Sess., "Minority Views," p. 63). The House then substituted a more limited definition of enterprise coverage (107 Cong. Rec. 4797, 4812-4813). In the Senate, however, the Committee Report urged adoption of the original text (S. Rep. No. 145, 87th Cong., 1st Sess., p. 3), and motions to substitute more limited definitions omitting the "handling" provision were rejected (107 Cong. Rec. 6088-6089, 6243). The "far reaching" definition retained in the Senate bill was accepted in conference (Conf. Rep. to Accompany H.R. 3935, H. Rep. No. 327, 87th Cong.,

1st Sess., pp. 2, 14-16) and enacted. That definition was correctly applied here.[3]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3]In *Maryland* v. *Wirtz*, 392 U.S. 183, 188, the Supreme Court stated that "the effect of the 1961 change was * * * not to enlarge the class of employers subject to the Act". As the Court of Appeals for the Second Circuit has pointed out, however, that statement was addressed only to the portion of the 1961 amendment which extended the Act's coverage to all employees of enterprises that had some employees engaged in commerce or in the production of goods for commerce. It was "not directed to the impact of the words concerning employees working with goods that 'have been moved in * * * commerce * * *' " (*Melos*, *supra*, 408 F. 2d at 628, n. 5).